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16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN JOSE DIVISION

19 TWIN PEAKS SOFTWARE INC.

20 Plaintiff,

21 v.

22 RED HAT, INC. AND GLUSTER, INC.,

23 Defendants.

Case No. 5:12-cv-00911-RMW

**PLAINTIFF TWIN PEAKS SOFTWARE  
INC.'S MOTION TO RETAIN  
CONFIDENTIALITY OF ITS SOURCE  
CODE**

Date: February 8, 2013

Time: 9:00 am

Courtroom: 6

The Honorable Ronald Whyte

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on February 8, 2013, at 9:00 a.m., in Courtroom 6, 4th Floor located at 280 South First Street, San Jose, California 95113, Plaintiff Twin Peaks Software Inc. ("Twin Peaks") will, and hereby does move pursuant to Paragraph 6.3 of the N.D. Cal. Patent L. R. 2-2 Interim Model Protective Order ("Model Protective Order") for an order from this Court to retain the confidentiality of Twin Peaks' source code made available to Defendants in discovery in this action under the designation "HIGHLY CONFIDENTIAL – SOURCE CODE." This Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the declarations of John P. Wong and Jennifer C. Lu, and the proposed order submitted herewith, all papers and pleadings on file in this action, such other evidence and argument as may be presented at or before any hearing on this Motion, and all matters of which the Court may take judicial notice. This Motion is made following the conference of counsel pursuant to Paragraph 6.2 of the Model Protective Order, which took place on December 3, 2012.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. ISSUE TO BE DECIDED – CIVIL L.R. 7-4(a)(3)**

Whether Plaintiff Twin Peaks Software Inc. ("Twin Peaks") has properly designated the source code for its proprietary software products made available to Defendants during discovery in this action as "HIGHLY CONFIDENTIAL – SOURCE CODE" under this Court's Patent L. R. 2-2 Interim Model Protective Order ("Model Protective Order").

**II. INTRODUCTION**

This motion concerns the scope of protection that should be given to Twin Peaks' most highly prized and confidential asset: its product source code. Always maintained in

1 secrecy, Twin Peaks' source code is the nucleus of its software products and the result of over  
2 ten years in research and development. The issue at stake is brought upon by Defendant Red  
3 Hat, Inc.'s ("Red Hat") baseless demand that Twin Peaks disclose its proprietary trade secrets  
4 to a *direct competitor* without the protection of the requisite confidentiality designations.  
5 Notably, to date, Red Hat has not even provided any evidence to support its challenge to Twin  
6 Peaks' confidentiality designation of its source code.

7  
8 Twin Peaks has made available to Defendants for inspection in this case its proprietary  
9 source code for several of Twin Peaks' software products and designated this proprietary  
10 source code as "HIGHLY CONFIDENTIAL – SOURCE CODE" information pursuant to  
11 Paragraphs 2.9 and 9(a) of the Model Protective Order. Red Hat has asserted that Twin  
12 Peaks' source code should not be afforded any confidentiality protections whatsoever, based  
13 on the unfounded allegation that Twin Peaks' software contains lines of code that are publicly  
14 available. Contrary to Red Hat's accusations, Twin Peaks developed its software internally  
15 and has never shared the source code for its software to the public. Instead, Twin Peaks has  
16 taken careful precautions to protect its source code as proprietary, trade secret information to  
17 prevent others from misappropriating Twin Peaks' technology.

18  
19 In challenging Twin Peaks' confidentiality designation of its source code, Red Hat  
20 seeks to force Twin Peaks to do what is highly unusual and unprecedented: remove  
21 confidentiality for its highly sensitive source code and disclose it without protection to Red  
22 Hat, a direct competitor to Twin Peaks. Red Hat's challenge, if successful, would pose  
23 potentially catastrophic risks and irreparable harm to Twin Peaks.

24  
25 Courts are especially sensitive to the potential for harm where confidential technical  
26 information is disclosed during discovery. *See, e.g., Safe Flight Instrument Corp v.*  
27 *Sundstrand Data Control Inc.*, 682 F. Supp 20, 22 (D. Del. 1988) ("Courts often afford fuller  
28

1 protection to technological information than that extended to ordinary business  
2 information.”). Furthermore, “courts have found an increased risk of harm when information  
3 is being disclosed to a direct competitor.” *Intel Corp. v. CIA Technologies, Inc.*, 198 F.R.D.  
4 525, 531 (N.D. Cal. 2000). Other cases involving source code in the Northern District of  
5 California have adopted the Model Protective Order which provides a heightened level of  
6 protection for source code. *See* Protective Order, *Dynetix Design Solutions, Inc. v. Synopsis,*  
7 *Inc.*, No. 5:11-cv-05976-PSG (N.D. Cal. Apr. 12, 2012), ECF No. 39. Because Twin Peaks’  
8 proprietary source code contains extremely sensitive and confidential information, the Court  
9 should enter an order retaining confidentiality of Twin Peaks’ source code files as “HIGHLY  
10 CONFIDENTIAL – SOURCE CODE” in order to preserve Twin Peaks’ highly-valued  
11 intellectual property and prevent any unprotected disclosure to Red Hat.  
12

### 13 **III. STATEMENT OF FACTS**

14 Twin Peaks brought this patent infringement action against Red Hat and Gluster, Inc.  
15 (“Gluster”) on February 23, 2012. (Dkt. No. 1). Twin Peaks alleges that various Red Hat and  
16 Gluster file system products infringe Twin Peaks’ U.S. Patent No. 7,418,439 (“the ’439  
17 patent”). (Dkt. No. 22 at 2). Red Hat has asserted a counterclaim of copyright infringement  
18 against Twin Peaks, alleging that certain software products sold by Twin Peaks infringe  
19 copyrights allegedly owned by Red Hat. (Dkt. No. 33 at 12-13). Discovery in the case is still  
20 in its early stages, and to date, the parties have yet to agree on the terms of a stipulated  
21 protective order in the case. Instead, the parties have been proceeding under the provisions of  
22 the Model Protective Order, as required under Patent L.R. 2-2.  
23

24 Twin Peaks believes that Red Hat’s allegations of copyright infringement are baseless.  
25 Indeed, when Twin Peaks has asked Red Hat for information regarding the basis of its  
26 copyright infringement counterclaim, Red Hat has refused to provide it. For example, Twin  
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28

1 Peaks has served interrogatories asking Red Hat to explain the factual basis of its copyright  
2 infringement claim but Red Hat has refused to provide any substantive response. (Ex.<sup>1</sup> A at  
3 8-9; Ex. B at 12; Ex. C at 1).

4 Despite Twin Peaks' belief that Red Hat's alleged copyright infringement  
5 counterclaim is frivolous, Twin Peaks has been nothing but forthcoming in providing  
6 discovery to Red Hat on its copyright counterclaim, even at this early stage of the case.  
7 Pursuant to Paragraph 9(c) of the Model Protective Order, Twin Peaks made available 245  
8 files of its source code for inspection at the offices of Twin Peaks' counsel on November 7,  
9 2012. (Lu Decl.<sup>2</sup> at 3; Ex. D at 1; Ex. E at 1). These source code files relate to various Twin  
10 Peaks software products, including TPS Replication Plus for Solaris, TPS Cluster Plus for  
11 Solaris, TPS My Mirror for Linux, and TPS Replication Plus for Linux. (Wong Decl.<sup>3</sup> at 6).  
12 These software products are file system management products that directly compete with Red  
13 Hat and Gluster's file system products. (Wong Decl. at 10).

14  
15  
16 On November 8, 2012, counsel for Red Hat came to the offices of Twin Peaks'  
17 counsel to inspect the code. (Lu Decl. at 4; Ex. F at 1). Counsel for Red Hat spent  
18 approximately two hours inspecting Twin Peaks' proprietary source code.<sup>4</sup> (Lu Decl. at 4).

19 Apart from this single two-hour visit to Twin Peaks' counsel's office, Red Hat has  
20 made no other attempt to visit the offices of Twin Peaks' counsel to inspect the source code.  
21 (Lu Decl. at 6).

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22  
23 <sup>1</sup> References herein to "Ex. [X]" refer to exhibits attached to the Declaration of Jennifer C. Lu  
24 filed concurrently herewith.

25 <sup>2</sup> References herein to "Lu Decl." refer to the accompanying Declaration of Jennifer C. Lu  
26 filed concurrently herewith.

27 <sup>3</sup> References herein to "Wong Decl." refer to the accompanying Declaration of John P. Wong  
28 filed concurrently herewith.

<sup>4</sup> At the end of this visit, Red Hat's counsel requested a printout of 830 pages of Twin Peaks'  
source code. (Lu Decl. at 5). Twin Peaks has objected to this request on the ground that  
Twin Peaks believes this request to be an unreasonable amount of pages under paragraph 9(d)  
of the Model Protective Order. (Ex. G).

1 Twin Peaks has designated the source code files made available for inspection to Red  
2 Hat as “HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to Paragraphs 2.9 and 9(a)  
3 of the Model Protective Order. (Ex. E at 1). Specifically, Twin Peaks’ proprietary source  
4 code files are extremely sensitive and any disclosure of the source code files without this  
5 designation would create a substantial risk of serious harm that could not be avoided by less  
6 restrictive means. (Wong Decl. at 11-12).

7  
8 On November 20, 2012, Red Hat, Inc. challenged Twin Peaks’ designation of its  
9 source code as “HIGHLY CONFIDENTIAL – SOURCE CODE” and requested that Twin  
10 Peaks remove the confidentiality designation of its source code and/or lower its designation  
11 for any non-public portions of the code. (Ex. H at 1). Red Hat’s challenge is premised on its  
12 unfounded allegation that certain lines of Twin Peaks’ source code are publicly-available  
13 open-source code. (*Id.*) However, to date, Red Hat has failed to identify any lines of the  
14 publicly-available code allegedly contained in Twin Peaks’ source code. (Ex. I at 1; Ex. B at  
15 12; Ex. C at 1). In response to Red Hat’s challenge, Twin Peaks refused and stood by its  
16 designations, maintaining that it has never disclosed any of its proprietary source code to the  
17 public. (Ex. J at 1).

18  
19 Counsel for the parties held a telephonic meet and confer on December 3, 2012. The  
20 parties reached an impasse and it became apparent that court intervention would be necessary  
21 to retain confidentiality of Twin Peaks’ source code designation. (Ex. C at 1). Red Hat  
22 clearly does not intend to abide by the confidentiality designation Twin Peaks has placed on  
23 its source code. Therefore, because Red Hat insists that the source code is not entitled to the  
24 proper confidentiality protection, Twin Peaks cannot provide Red Hat with any printouts of its  
25 proprietary source code until the Court has resolved the confidentiality designations for the  
26 source code. (Ex. H at 1).



1 IV. ARGUMENT

2 A. Twin Peaks' Source Code Files are Proprietary and Constitute Its Most  
3 Highly Prized and Confidential Asset

4 Twin Peaks has properly designated its source code files in this case as "HIGHLY  
5 CONFIDENTIAL – SOURCE CODE." The Model Protective Order defines "HIGHLY  
6 CONFIDENTIAL – SOURCE CODE" as "extremely sensitive 'Confidential Information or  
7 Items' representing computer code...disclosure of which to another Party or Non-Party would  
8 create a substantial risk of serious harm that could not be avoided by less restrictive means."  
9 (Model Protective Order at ¶ 2.9). Furthermore, under the Model Protective Order, "to the  
10 extent production of source code becomes necessary in this case, a Producing Party may  
11 designate source code as 'HIGHLY CONFIDENTIAL – SOURCE CODE' if it comprises or  
12 includes confidential, proprietary or trade secret source code." (Model Protective Order at ¶  
13 9(a)).  
14

15 There is no question that Twin Peaks' source code warrants the "HIGHLY  
16 CONFIDENTIAL – SOURCE CODE" designation, as the code comprises and includes  
17 confidential, proprietary, and trade secret information. Twin Peaks' source code is the  
18 nucleus for Twin Peaks' software products. Specifically, Twin Peaks has devoted over 10  
19 years in research and development on the source code for its products, including TPS  
20 Replication Plus for Solaris, TPS Cluster Plus for Solaris, TPS My Mirror for Linux, and TPS  
21 Replication Plus for Linux. (Wong Decl. at 5-6). This code was developed internally within  
22 Twin Peaks and has never been disclosed to the public. (Wong Decl. at 8). Even within its  
23 own company, Twin Peaks implements strict controls over access to its source code,  
24 maintaining copies of the source code only in a locked room on highly secure servers with  
25 firewall and password protection and even limiting its own employees' access to the code on a  
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1 need-to-know basis. (Wong Decl. at 9). Thus, Twin Peaks' source code constitutes  
 2 confidential and proprietary information to Twin Peaks.

3 For similar reasons, Twin Peaks' source code is also Twin Peaks' trade secret  
 4 information. Under California law, a "trade secret" is defined as "information, including a  
 5 formula, pattern, compilation, program, device, method, technique, or process, that: (1)  
 6 Derives independent economic value, actual or potential, from not being generally known to  
 7 the public or to other persons who can obtain economic value from its disclosure or use; and  
 8 (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.  
 9 Cal. Civ. Code § 3426.1. Twin Peaks' source code meets these requirements. First, Twin  
 10 Peaks' code includes formulas, patterns, programs, methods, techniques, and processes from  
 11 which Twin Peaks derives independent value from the code not being generally known to the  
 12 public. Specifically, the secrecy of Twin Peaks' code allows Twin Peaks to market and sell  
 13 its software to customers while minimizing the risk that others will engage in unauthorized  
 14 copying and/or use of Twin Peaks' proprietary formulas, patterns, programs, methods,  
 15 techniques, and processes. Second, as detailed above, Twin Peaks has engaged in reasonable  
 16 efforts to maintain the secrecy of its source code, maintaining the code in a highly secure set  
 17 of servers. Twin Peaks' code is therefore trade secret information requiring the highest level  
 18 of confidentiality designation allowed under the Model Protective Order.  
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21 **B. Disclosure of Twin Peaks' Source Code without the Current**  
 22 **Confidentiality Designation Creates an Irreparable Risk of Harm to Twin**  
 23 **Peaks**

24 Disclosure of Twin Peaks' source code to Red Hat and Gluster without the current  
 25 "HIGHLY CONFIDENTIAL – SOURCE CODE" designation would create an unfair risk of  
 26 irreparable harm to Twin Peaks. To determine whether and the extent to which a trade secret  
 27 or other confidential information should be revealed in discovery, courts balance the risk of  
 28

1 inadvertent disclosure and harm to the disclosing party against the risk that the protection of  
 2 information will impair the prosecution or defense of the other party's claims. *See Brown*  
 3 *Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992). Without the necessary  
 4 confidentiality designation, Twin Peaks' competitive advantage would be severely  
 5 compromised.

6 Importantly, "[c]ourts have presumed that disclosure to a competitor is more harmful  
 7 than disclosure to a noncompetitor." *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734,  
 8 741 (Fed. Cir. 1987). "Even a seemingly insignificant risk of disclosure cannot be ignored  
 9 due to the threat of significant potential injury." *Intel Corp. v. VIA Technologies, Inc.*, 198  
 10 F.R.D. 525, 531 (N.D. Cal 2000) (citing *Brown Bag*, 9650 F.2d at 1470). Since Red Hat and  
 11 Gluster distribute software products that are in direct competition with Twin Peaks'  
 12 technology, disclosure of Twin Peaks' proprietary source code to Red Hat and Gluster  
 13 without the highest confidentiality designation would create a substantial risk of serious harm  
 14 and threat to Twin Peaks. Unless access to Twin Peaks' source code is limited to Red Hat and  
 15 Gluster's outside counsel and in-house counsel who have no involvement in competitive  
 16 decision-making, as contemplated in the Model Protective Order (*see* Model Protective Order  
 17 at ¶ 7.3), there is simply too great of a risk that others at Red Hat or Gluster could potentially  
 18 misuse Twin Peaks' source code to Twin Peaks' competitive disadvantage. This clearly tips  
 19 the balance of equities in favor of retaining confidentiality of Twin Peaks' source code as  
 20 "HIGHLY CONFIDENTIAL – SOURCE CODE."  
 21  
 22

23  
 24 **C. Red Hat's Allegation that Twin Peaks' Source Code is Not Proprietary is**  
 25 **Baseless**

26 Red Hat's sole basis for challenging Twin Peaks' confidentiality designation of its  
 27 source code is the assertion that Red Hat's counsel found evidence that Twin Peaks' source  
 28 code includes lines of code that are publicly available during his two-hour inspection of the

code. But this argument is meritless for several reasons.

First, while Red Hat alleges that Twin Peaks' source code contains lines of publicly-available open-source code, to date it has yet to identify any such lines. (Ex. I at 1). In response, Red Hat argues that it needs printouts of Twin Peaks' source code in order to point out the portions of the code that are purportedly public. (*Id.*) But this is nothing more than an improper attempt by Red Hat to obtain copies of Twin Peaks' source code. As discussed above, to date Red Hat has demanded that Twin Peaks produce 830 pages of printouts of its source code, which Twin Peaks believes is excessive, particularly when those 830 pages were identified by a Red Hat attorney after spending only two hours looking at Twin Peaks' source code. The Model Protective Order specifically states:

The Receiving Party may request paper copies of limited portions of source code that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or other papers, or for deposition or trial, but shall not request paper copies for the purposes of reviewing the source code other than electronically as set forth in paragraph (c) in the first instance.

(Model Protective Order at ¶ 9(d)). There is simply no way that Red Hat's counsel could determine that all 830 pages of the requested Twin Peaks source code are "reasonably necessary" as set forth in paragraph 9(d) of the Model Protective Order based on a cursory two-hour review of the code.

Moreover, it is important to note that Red Hat readily admits that it cannot identify any lines of code that Twin Peaks purportedly copied from Red Hat without first having access to printouts of Twin Peaks' source code. (Ex. B at 12; Ex. C at 1). This further highlights the fact that Red Hat filed its copyright counterclaim against Twin Peaks without any sort of factual basis to support this counterclaim.

**D. Red Hat's Challenge to Twin Peaks' Source Code Designation is Meritless Even If Red Hat Could Identify Any Lines of Publicly-Available Code in Twin Peaks' Source Code**

1 Even if Red Hat could show that Twin Peaks' source code does contain lines of  
2 publicly-available source code, Red Hat's challenge to Twin Peaks' source code designation  
3 would still be meritless.

4 The mere fact that a software program may contain some sections of publicly-  
5 available material does not mean that the program's source code is not protectable as  
6 confidential information. Indeed, Red Hat ignores the clear language of the Model Protective  
7 Order, which states that "a Producing Party may designate source code as 'HIGHLY  
8 CONFIDENTIAL – SOURCE CODE' if it ***comprises or includes*** confidential, proprietary or  
9 trade secret source code." (Model Protective Order at ¶ 9(a)) (emphasis added). In other  
10 words, source code can be designated as "HIGHLY CONFIDENTIAL – SOURCE CODE"  
11 under the Model Protective Order so long as ***at least some*** of the code includes information  
12 that is confidential, proprietary, or trade secret information. Red Hat's attempt to parse out  
13 some portions of Twin Peaks' source code as being non-confidential is therefore improper.  
14 So long as the combination, arrangement, or design of the code is confidential, proprietary, or  
15 trade secret information, then the entirety of the code should be subject to the same  
16 confidentiality designation. *See, e.g., Kendall Holdings, Ltd. V. Eden Cryogenics, LLC*, 2011  
17 WL 3652696, at \*2 (S.D. Ohio Aug. 18, 2011) ("In a case which involves design drawings  
18 and engineering plans for specific products, a party may claim that the drawings and plans, as  
19 a whole, constitute trade secrets even if they contain some non-secret or public information.  
20 In fact, even if each separate component of a drawing or plan can be found in the public  
21 domain, the way in which those components are combined may well qualify for trade secret  
22 protection."); *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 410-411 (6th Cir.  
23 2006) ("A trade secret can exist in a combination of characteristics and components, each of  
24 which, by itself, is in the public domain, but the unified process, design and operation of  
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1 which, in unique combination, affords a competitive advantage and is a protectable secret.”).

2 Copyright law also supports Twin Peaks’ position that its source code necessitates  
 3 protection as highly confidential information. Under 17 U.S.C. §§101 *et seq.*, a compilation  
 4 is “a work formed by the collection and assembling [1] of preexisting materials or [2] of data  
 5 that are selected, coordinated, or arranged in such a way that the resulting work as a whole  
 6 constitute an original work of authorship.” Courts have found that source code can be a  
 7 copyrightable “compilation” of parameters and command terms. *See, e.g., Digital*  
 8 *Communications Associates, Inc. v. Softklone Distributing Corp.*, 659 F. Supp. 449, 462-463  
 9 (N.D. Ga 1987) (Protecting computer program’s “status screen” as a compilation). In *Digital*  
 10 *Communications*, the court stated that the “specific placement, arrangement and design of the  
 11 parameter/command terms [] is neither arbitrary nor predetermined, but, rather, is the result of  
 12 extensive original human authorship...Therefore, [such compilation] is copyrightable to the  
 13 extent of its arrangement and design of the parameter/command terms.” *Id.* Thus, even if  
 14 there were any lines of publicly-available source code in Twin Peak’s software, the software  
 15 as a whole still comprises an original work of authorship and design. As such, Twin Peaks’  
 16 software must be protected as proprietary information. Therefore, Red Hat’s challenge to the  
 17 confidentiality of Twin Peaks’ source code is meritless and it is essential that Twin Peaks  
 18 continue designating its source code as “HIGHLY CONFIDENTIAL – SOURCE CODE”  
 19 under the Model Protective Order.

## 22 V. CONCLUSION

23 For the foregoing reasons, Twin Peaks respectfully requests that the Court retain  
 24 confidentiality for Twin Peaks’ source code made available in discovery in this case under the  
 25 designation “HIGHLY CONFIDENTIAL – SOURCE CODE.”  
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1 Dated: December 11, 2012

Respectfully submitted,

2  
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